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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1368

HAROLD KONIGSBERG,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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No. .....

HAROLD KONIGSBERG,

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—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Third Circuit, entered in this case on November 28th, 1969 (Appendix D, and E, pp. 17a and 24a).

Opinion Below

The Court of Appeals, Third Circuit, rendered an opinion affirming the order of the United States District Court for the District of New Jersey (Appendix D, p. 17a).

The opinion-order of the District Court is unreported (Appendix B, p. 2a) and the opinion of United States Court of Appeals is as yet unpublished (Appendix D, p. 17a).

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Jurisdiction

The order and judgment of the Court of Appeals, Third Circuit (Appendix D, p. 17a, *infra*) was made and entered November 28th, 1969. The jurisdiction of this Court is involved pursuant to Title 28 U.S.C. § 1254(1).

Question Presented

Whether the Court erred in denying petitioner a hearing pursuant to Title 28 U.S.C. § 2255 in that (a) an inculpatory statement obtained by custodial arresting officers through force and violence and attributed to petitioner should have been excluded from evidence in the trial proper as violative of the United States Constitution, Amendment V and VI; (b) in that petitioner was denied a hearing, *Jackson* v. *Denno,* 378 U.S. 368, on the admissibility of an alleged admission during and previous to trial, and (c) in that petitioner was denied on his § 2255 application to collaterally raise the issue of standing to attack evidence unconstitutionally seized and admitted against him in the Court of trial in violation of the United States Constitution, Amendment IV.

Constitutional Provisions Involved

The constitutional provisions involved are Fourth, Fifth and Sixth Amendments and are printed herein as Appendix F, p. 24a).

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Statement of the Case

This is an appeal from the affirmance of the Court of Appeals, Third Circuit, of an order of the United States District Court of New Jersey (Lawrence A. Whipple, *J.*) denying petitioner a hearing on his pro se motion to vacate his sentence and judgment of conviction pursuant to Title 28 U.S.C. § 2255.[1]

The petitioner was convicted in the United States District Court of New Jersey (Robert Shaw, *J.*) under Criminal Docket No. 31-62, for violation of 18 U.S.C. § 659 (unlawful possession of goods stolen from interstate commerce) and was sentenced on July 16th, 1963, to a term of ten (10) years.[2] The conviction was affirmed in *United States* v. *Konigsberg,* 336 F.2d 844 (3rd Cir. 1964). The United States Supreme Court denied certiorari in 379 U.S. 933, 13 L. ed. 2d 344 (1964). No other motions or applications have been filed related to this action other than the instant § 2255 application.

The Court of Appeals, Third Circuit, in its consideration of petitioner's direct appeal stated the facts as follows, *United States* v. *Konigsberg, supra,* at pp. 851-852:

> "The subject matter here involved was some stolen clothing. Konigsberg was one of five people found with the merchandise. At the time of trial he was thirty-five years old. He had been convicted of robbery in 1949. From his own testimony he was well acquainted with police arrest procedures. All of the people in the garage were told 'This is the F.B.I. You are under arrest.' The prisoners were instructed

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[1] In the United States District Court case carried Civil No. 465-68.

[2] Petitioner is still presently confined under service of this sentence at the U. S. Medical Center for Federal Prisoners in Springfield, Missouri.

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to put their hands against the garage wall. Konigsberg refused so the officers put handcuffs on him. Shortly after that all the prisoners were taken to the F.B.I. office in Newark, a few miles west of Bayonne, in several ordinary passenger cars driven by agents. Konigsberg rode with Agents Straub and Roetzel. Straub advised him that he was entitled to an attorney and that anything he said might be used against him in a court of law. At the F.B.I. office the prisoners were fingerprinted and photographed. Konigsberg had approximately $11,000 currency on his person which he meticulously counted with the agent. Straub testified that '* * * we asked him the circumstances as to why he was in the garage and just what had taken place. * * * We desired to talk and see if he wished to cleanse himself or explain. * * * As to why he was there.' Straub answered, 'If he could explain. We wanted to hear his side of the story that would come from him, if it would. We had to fingerprint Mr. Konigsberg. We had to photograph him.' Agent Roetzel also there, said that in the course of the talk Konigsberg '* * * made a statement that this was the only legitimate arrest that the F.B.I. had ever made of him. He made a statement that this was one thing we had, meaning the F.B.I. * * * He made the statement that there was one thing that we had that he didn't have, and that was stool pigeons, and he made the statement when he was asked what he was doing in the garage, he said, 'In what garage?' Then followed by a statement that, 'I was trying to help a fellow out."

In the § 2255 application in the District Court Konigsberg collaterally attacked his conviction contending that the judgment is constitutionally impermissive in that it is violative of the United States Constitution, Amendments IV, V and VI. Specifically, he argues:

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1. That new evidence made available to petitioner as a result of a New York State post-conviction hearing in the New York County Supreme Court to determine if he was then a multiple felony offender resulted in eliciting testimony from the same F.B.I. agents who were also witnesses at petitioner's trial resulting in the instant conviction. The testimony at the subsequent post-conviction hearing in the New York State Court established without question that the Government suppressed and/or knowingly withheld evidence from the Court and defense at Konigsberg's trial and, that furthermore, petitioner's right to counsel was abridged and moreover that a purported statement attributed to Konigsberg was received in evidence in violation of the United States Constitution, Amendments V and VI. The admission into evidence of the alleged inculpatory statement attributed to petitioner under the *totality of circumstances* from the trial proceedings coupled with the subsequent New York Supreme Court testimony resulted in demonstrating that a constitutional violation affecting *due process* infected the trial process making possible a conviction in an otherwise dubious case.

2. The petitioner further raised anew the issue of *standing* in his pro se § 2255 application in the District Court, a matter previously adjudicated against him on a pre-trial motion to suppress and preserved on appeal to this Circuit Court. *United States* v. *Konigsberg, supra,* at page 847. However, in view of recent Supreme Court decisions clarifying the issue of *standing* among the various circuits with retroactive effect petitioner contends that the ruling against him in this Court misapplied constitutional standards and was tantamount to a due process deprivation. Furthermore, that he has standing to raise this issue in a § 2255 application.

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Reasons for Granting the Writ

a) The Court should have granted a hearing pursuant to Title 28 U.S.C. § 2255 on petitioner's contentions:

(1) That an inculpatory statement obtained by custodial arresting officers through force and violence and attributed to him should have been excluded from evidence as violative of the United States Constitution, Amendments V and VI:

The District Court acknowledged and expressed itself unequivocally when it stated 28 U.S.C. § 2255 places an "affirmative duty to look into the files and records of the case and only if they *conclusively show* that the petitioner is entitled to no relief, can this motion be dismissed without an evidentiary hearing" (O. 2-3).[3] While the District Court did not allude to same, it is also true that the general rule is that in a § 2255 motion an allegation of fact made in support of the application must be accepted as true. *United States* v. *Hayman*, 342 U.S. 205, 96 L. ed. 232 (1952).

The Opinion-Order of the District Court maintains that petitioner's application cannot be used to act as a substitute for relitigation of his direct appeal. In conclusion, the District Court asserted that Konigsberg's contentions were a *de novo* attempt to reargue trial issues under different labels and that consequently an evidentiary hearing would prove nothing new that was not otherwise known to the District Court. It was District Court Judge Whipple's opinion that an evidentiary hearing would therefore on examination of the record in the District Court and the

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[3] Unless otherwise specified numerals preceded by the letter "O" refer to pages of Judge Whipple's Opinion-Order; numerals preceded by the letter "R" refer to the U.S.D.C. trial minutes and numerals preceded by letters N.Y. refer to record of hearing in New York County Supreme Court, a court exhibit hereto.

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New York Supreme Court viewed in a light most favorable to the petitioner prove fruitless to his cause. The District Court in its written Opinion-Order spoke accordingly (O. 10):

> "This is merely a collateral attempt by the petitioner to contradict the record made in the trial court in the 1963 federal trial. The record in this case completely contradicts petitioner's claim in this regard and compels the conclusion that in view of the allegations made and in view of the record and files, as well as the transcripts, this claim is without merit."

The Court of Appeals adopted the view of the District Court in stating that the New York State transcripts revealed no "substantial discrepancies from the testimony of the agents at the 1963 trial" (Appendix D, p. 17a).

An examination of the Opinion of the sentencing Court in the disposition of Konigsgerg's § 2255 application coupled with the view of the Third Circuit in affirming petitioner's conviction on direct appeal furnishes important background information reference the issue in contention. Briefly stated, petitioner with undeviating consistency attacked the inculpatory statement attributed to him. This District Court justified the inclusion into evidence of that statement on the rationale that when "F.B.I. agents talked with Konigsberg the process was definitely investigative and never shifted to accusatory." *United States* v. *Konigsberg, supra*, at page 852. In their fact-finding ruling to substantiate their legal theory both the District and Circuit Courts established the following, *Konigsberg, supra*, at pages 851-852:

1. During the investigatory stage, the petitioner's identity was not established until after the F.B.I. informed petitioner he was under arrest. As a matter of fact, F.B.I. Agent Straub indicated he was surprised to find the petitioner in the garage.

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2. During the investigatory process, the F.B.I. ordered petitioner (the Court at this juncture called him a "prisoner") to place his hands against the garage wall.

3. During the investigatory phase, when petitioner or prisoner, as the Court called him, was handcuffed when he refused to place his hands against the garage wall.

4. During the investigatory stage, the petitioner, again called prisoner, was driven by F.B.I. agents a few miles west of Bayonne to the Bureau's office.

5. During the investigatory process, F.B.I. agents informed Konigsberg that anything he might say would be used against him.

6. During the investigatory phase, the petitioner was mugged and fingerprinted.

7. During the investigatory stage, the F.B.I. searched the person of the petitioner and counted $11,000 currency on his person.

8. During the investigatory phase, the petitioner was handled in-custody administratively as F.B.I. procedure required of an arrested person.

At this point, the Court affirmed the District Court trial ruling that the "process was definitely investigative and never shifted to accusatory." *Konigsberg, supra,* at page 853. However, additional facts were revealed in the New York Supreme Court hearing as follows:

9. F.B.I. Agent Straub testified that before the purported statement was made the petitioner demanded to telephone his lawyer but this request was refused a number of times and it was not permitted until after the alleged statement was made (N.Y. 780, etc.).

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10. F.B.I. Agent Straub indicated that it was not until after three hours after Konigsberg's arrest was he allowed to call his lawyer (N.Y. 780).

11. Agent Straub admitted that petitioner was physically restrained from using the telephone to call his attorney for assistance previous to making the alleged statement (N.Y. 780, 792-794).

12. F.B.I. Agent Straub testified that he actually arrested petitioner and he was not making an investigation thus negating his trial testimony that he was trying to give Konigsberg a chance to explain himself (N.Y. 798-799).[4]

13. The administrative functions carried out by the F.B.I. involved an arrest procedure in preparation for arraignment before a United States Commissioner and not part of the investigatory stage all.

It is noteworthy to note in connection with ¶ 13 *supra* that a person held for investigation is not fingerprinted and photographed. The usual practice of the F.B.I. is for fingerprinting and photographing to be handled by United States Marshals previous to arraignment. Konigsberg was photographed and fingerprinted previous to the incriminatory statement attributed to him. Whether one believes the contradictory testimony of the prosecution in the District Court as against the testimony in New York Supreme Court (R. 1066 and N.Y. 341) the fact is that the petitioner was handled for purposes of arraignment and not investigation.

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[4] References to the fact that petitioner was under arrest as the term was used by the F.B.I. are replete throughout the trial record of the United States District Court T. 268, 311, 358, 360, 361, 385, 386, 387, 388, 440, 442, 481, 482, 515, 526, 527, 633, 718, 742, 748, 749, 753, 838, 847, 857, 916, 918, 920, 1062, 1065, 1066, 1107, 1108, etc.

Petitioner maintains that if the *Nisi Prius* Court had been furnished the facts as they were subsequently presented at the New York Supreme Court multiple felony hearing, the exclusionary rule would have been compelled by the then constitutional mandate in *Escobedo* v. *Illinois*, 378 U.S. 478, 84 S. Ct. 1758 (1964), and under the *totality of circumstances*. In the *Escobedo* decision, *supra*, this Court wrote:

> "We hold only that when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer."

Along with all the factors concerning the in-custody interrogation of the petitioner is the circumstance that the arrest here unquestionably took place somewhere around 9:30 p.m. on January 11th, 1962. While enroute from Bayonne to Newark, Konigsberg asked permission to make a telephone call to his lawyer. The F.B.I. refused to allow him to do so (R. 879, 882). F.B.I. Agent Straub's own statement corroborated by that of Agent Roetzel clearly admits that petitioner asked several times to telephone his lawyer and that on each occasion he was refused (R. 883, 884, 887, 889) and furthermore petitioner was *physically restrained from so doing* (N.Y. 790). The presecution pretense for such conduct was that the F.B.I. was interested in giving Konigsberg an opportunity to present his side of the story (R. 865). In other words, having given lip-service to petitioner's right to counsel their aim was perfectly clear. The prosecution and their agents wanted conversation from the petitioner and if possible such that would incriminate petitioner by his own mouth. Assuming the F.B.I. statements to be true, they succeeded masterfully! It is precisely this type of conduct that this Court struck down as amounting to a constitutional infirmity. *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

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After several hours of conversation and approximately at 1:30 a.m., according to the prosecution, or 3 a.m. or 4 a.m., according to the defense, of January 12th, 1962 (R. 882, 1859) the petitioner was able to telephone his lawyer. By this time the statement attributed to petitioner was already claimed by the F.B.I. (R. 890, 891).

On the issue of voluntariness it is also important to consider the *totality of circumstances* concerning the appellant's apprehension, arrest and arraignment before the United States Commissioner. *McNabb* v. *United States,* 318 U.S. 332 (1943) and *Mallory* v. *United States,* 354 U.S. 449 (1957) require that a federal defendant be brought without unnecessary delay before the nearest available commissioner lest statements obtained be excluded. The rule is concerned with the Fifth and Sixth Amendments of the United States Constitution and is grounded on Rule 5 (a) of the Federal Rules of Criminal Procedure. It must likewise be considered on the issue of voluntariness and within all the circumstances concerning the alleged admission attributed to petitioner.

Considering the facts here under the most optimum circumstances for the prosecution it is apparent from all the evidence that at the time of the questioning petitioner is in-custody and under arrest. Konigsberg is informed by the custodial authorities that he is entitled to an attorney but they refuse him the right to either call one and use physical restraint to prevent his grabbing a telephone for this admitted purpose. *The right proffered to him is forcefully denied.* If nothing else but this had been said in the New York State Supreme Court testimony of the F.B.I. agents a hearing was compelled by petitioner's § 2255 application below. The F.B.I. waits and continues to talk to the petitioner. The impression created is that the F.B.I. is giving the petitioner an opportunity to talk himself out of their headquarters. Such a contention by the prosecution is absurd. *It defies the facts that the petitioner was*

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told he was under arrest, seized, handcuffed, transported, searched and property seized, fingerprinted, mugged and denied counsel. If after all of this it is the claim of the prosecution that they merely wanted to hear Konigsberg's side of the story credibility is taxed. Instead of a prompt arraignment as required by judicial decision and the Rules of Criminal Procedure, there is a significantly delayed arraignment for petitioner is not brought before the United States Commissioner from the time of his arrest on January 11th, 1962 at 9:30 P.M. until January 12th, 1962 at approximately 3 P.M. The delayed arraignment of the petitioner was for the exclusive purpose of eliciting statements from him under the circumstances as stressed by the testimony in the New York State Supreme Court proceedings. Such conduct makes mandatory the application of the *McNabb-Mallory* rule and the exclusion of the statement. Had District Court Judge Whipple in his Opinion-Order permitted a hearing the petitioner would have more fully developed the facts of this delayed arraignment as reflecting upon the issue of voluntariness.

A hearing would have determined if Konigsberg was deliberately secreted from his then counsel specially in view of the fact that defendant was being moved from F.B.I. headquarters to local police officers and petitioner's attorney found it impossible either to locate or communicate with his client. An evidentiary hearing would have settled this matter and established the "hide and seek" game the F.B.I. played and its consequences on the *totality of circumstances.*

The Opinion-Order of the sentencing Court recognized that Konigsberg was not disputing that a § 2255 proceeding cannot be used to act as a substitute for a direct appeal (O. 2), and while *Dirring* v. *United States,* 370 F.2d 862 (1st Cir. 1967) at page 864, ruled "on a motion to vacate sentence or judgment we will not re-review grounds for relief previously considered and determined," the admitted

question is "whether petitioner is entitled to a hearing on his motion (O. 3)." The petitioner here raises issues of constitutional magnitude while in *Dirring, supra,* at page 861, the Court opined the grounds advanced there were frivolous. "Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged." *Sanders* v. *United States,* 373 U.S. 1, 10 L. ed. 2d 148 (1963)—The District Court Opinion-Order asserted that "there appears to be little doubt or disagreement that issues disposed of on appeal from the original judgment of conviction will not be reviewed again under § 2255 if the precise issues were raised on direct appeal (O. 2)." The sentencing Court cited *Sykes* v. *United States,* 341 F.2d 104 (8th Cir. 1965) for this proposition but this case suggests nothing to the effect what the result would have been had additional facts been presented in that litigation laying the basis for a constitutional claim. In *Fryre* v. *United States,* 337 F.2d 385 (7th Cir. 1964) also cited by the sentencing Court in its opinion is inapposite. Here, Frye did not aver additional facts to his argument in order to support his constitutional contention and his second claim in support of his § 2255 motion asserting a failure to comply with Federal Rules of Criminal Procedure, 32(a) (right of allocation) was not of constitutional import nor was it jurisdictional. On this basis Fryre was denied in his § 2255 effort.

Likewise cited in the Opinion-Order is *Baca* v. *United States,* 383 F.2d 154 (10th Cir. 1967) in which Baca urged three grounds in his § 2255 application. As far as the grounds related to the hostility and bias of the trial judge and the refusal to grant a new trial on newly discovered evidence there was not a scintilla of additional facts to support these allegations all of which had been specifically adjudicated on direct appeal. In the *Baca* case, *supra,* the Court was primarily concerned with the issue of general sentence and in this respect is unlike the issue raised by petitioner here.

Also cited by the sentencing Court in its Opinion-Order is *Lampe* v. *United States,* 288 F.2d 881 (D.C. Cir. 1961) where appellant attempted to raise on appeal an issue not raised in his § 2255 petition. The Court there felt it improper to consider the matter but in any case clarified that the issue of the voluntariness of Lampe's statement had been reviewed on his direct appeal. Unlike the present case there was no additional supporting evidence to bolster the § 2255 claim of constitutional deprivation.

It is in the interests of justice that petitioner here claims that the sentencing Court should have afforded him at the very least a hearing to determine on the merits whether under the *totality of circumstances,* the statement attributed to him should have been excluded from evidence. *Sanders* v. *United States, supra.*

The sentencing Court in its Opinion-Order did not fully realize the implication of appellant's arguments. It maintained (O. 5-6):

> "If the legality of petitioner's detention has been decided adversely to him on direct appeal, in determining the right to § 2255 relief, the issue becomes whether adequate relief had been afforded at that time. During the petitioner's 1963 federal trial, pursuant to the testimony of the FBI witnesses, as well as other evidence, the trial court found that while in custody he was fully and completely advised of his constitutional rights to the extent that he was notified of his right to counsel; he was warned before he made any statement that he was not required to make statements; and he was informed that anything he said could be used against him in a court of law. . . . The legality of his detention was raised and decided adversely to him on a direct appeal, *Konigsberg, supra,* and may not be relitigated."

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The Court of Appeals and District Court in concurrent findings ignore that the additional facts obtained through the testimony of F.B.I. Agent Straub and Roetzel showed a forceful restraint and an effective denial of counsel after having proffered the right (N.Y. 792). The petitioner does not argue for a retroactive application of *Miranda* v. *Arizona,* 384 U.S. 436 (1966) but maintains that he was denied effective assistance of counsel when he was physically stopped from calling counsel and that all the facts combined evidenced a *totality of circumstances* effectively denying him his constitutional rights to counsel and self-incrimination under the Fifth and Sixth Amendments of the United States Constitution. The issue here is not as the sentencing Court would have us believe one of retroactive application and relitigation but rather *due process* and *fair trial.* Under the total circumstances a fact-finding hearing should have been ordered by the Court and appellant should have been permitted to lay the foundation for his effective denial of due process.

Furthermore, the statement attributed to the petitioner is of pertinent and paramount importance when one considers that the Court specifically charged (R. 2268):

> "I further charge you that possession of property recently stolen if not satisfactorily explained is a circumstance from which a jury may draw the inference and find that the person in possession knew the property to have been stolen. The same inference may be drawn from a false explanation of such possession."

On the question of the *totality of circumstances* the Court by this charged imposed a burden upon the petitioner to come forward and explain. It totally disregarded the spirit of the Fifth Amendment which was later crystalized in *Miranda* v. *Arizona, supra,* that an accused need not convict himself by his own statement. The *Miranda* ruling applied from the commencement of the accusatory stage

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when a defendant becomes the specific target of the investigation. It is logical to assume that if defendant need not explain anything at that time a future burden imposed upon him at trial of explaining recent possession is constitutionally impermissive. This charge must likewise be considered with all the circumstances of the arrest and trial of the petitioner if one is to properly view here the total failure of due process. On all the issues raised by the record here which the sentencing Court indicated it had considered the petitioner's cause must be remanded to the District Court for a full and complete evidentiary hearing in order to determine whether in fact and in law the statement of incriminatory import should have gone to the jury for their consideration.

Reliance on *Johnson* v. *New Jersey*, 384 U.S. 719 (1966) for the proposition that *Escobedo* v. *Illinois*, 378 U.S. 478 (1964) and *Miranda* v. *Arizona*, 384 U.S. 436 (1966) bars the application of the constitutional rules of each of those decisions to petitioner's claim of involuntariness is misplaced. The *retroactivity doctrine* which has crept into our constitutional law and which has met with criticism from this Court is not the issue here but as indicated previously, rather *fair trial* and *due process* in that under *the totality of circumstances* the incriminatory statement attributed to petitioner should have been excluded from evidence. *Desist* v. *United States*, 394 U.S. 478 (1964).

The distinction, of course, is that petitioner is arguing a *totality of circumstances* as affecting his constitutional claims on this issue of voluntariness. Notwithstanding the central issue of petitioner's argument, the *retroactivity doctrine* urged, although having been enunciated by our highest court, is a constitutional anomaly which has no foundation in our constitutional laws, and, as a matter of fact, is specifically prohibited by the United States Constitution itself in Art. 1, Section 9, Clause 3, when it outlawed the infamous *bills of attainder* of which the *retroactivity doctrine* is akin. *Bills of attainder* as inter-

preted by the Supreme Court prohibits all legislative acts, "no matter what their form, that apply either to named individuals or to easily ascertainable members of groups in such a way as to inflict punishment on them without a judicial trial." *United States* v. *Lovett,* 328 U.S. 303, 315 (1946). When the retroactivity doctrine was innovated by the court it was in effect usurping the powers of the legislature, not by interpreting the Constitution as is its right, but by legislating on which given Tuesday or Thursday the new constitutional precepts embodied in *Escobedo* and *Miranda, supra,* would go into effect. It is incongruous to note that petitioner raised the *Miranda* issues before Miranda himself. What amounts to a *bill of attainder* under label of *retroactivity* militates against petitioner in securing the benefit of his constitutional rights and thus deprives him of a judicial trial and appellate process and inflicts punishment upon him by the announced refusal of the Court of Appeals and District Court to apply existing constitutional law to him and thus granting a hearing.

(2) That petitioner was denied a Jackson v. Denno, 378 U.S. 368 hearing on the admissibility of an alleged admission.

Jackson v. *Denno,* 378 U.S. 368 (1964) overturned the previously upheld New York procedure in permitting the issue of voluntariness to go directly to the jury for their determination. This was overruled as the New York procedure could do no justice to the defendant's rights and that it contravened the due process clause of the United States Constitution as it applied to the States. It mandated the issue of voluntariness must first be determined by the Court even before the factors and circumstances surrounding the purported statements were introduced to the jury. *Jackson* v. *Denno, supra,* adopted the Massachusetts rule. It is evident that the petitioner here was likewise entitled to a hearing on this issue of the voluntariness of his statements outside the presence of the jury. As a matter

of fact petitioner Konigsberg's then counsel at the time the statement was about to be introduced against the appellant indicated to the Court (R. 845):

> "The foundation certainly has to be—and I am entitled to a preliminary hearing on it, which I hereby demand, as to the nature of the so-called instructions, where they were given, how they were given, what the conditions were."

The trial court permitted counsel to conduct a preliminary inquiry *but in the presence of the jury.* Sometime later and after the preliminary inquiry had undergone extensive testimony the Court indicated (R. 868):

> "We are dealing here with something in the nature of a confession, perhaps not a full confession but a—A very incriminatory statement or statements. Now, under these circumstances I do feel in connection with the interrogation as to the voluntariness of the statement that it might serve the best interests of justice if counsel are made aware of the statements before they are submitted to the jury so that I have an opportunity to hear all arguments fully with respect to them and the circumstances under which they were taken."

The examination of F.B.I. Agent Straub then continued outside the presence of the jury (R. 876). The fact is nonetheless that the jury had already heard a major portion of the preliminary hearing on voluntariness in their presence and at this time to continue the same hearing outside their presence was a futile act which did not correct the failure of due process nor did it afford sufficient protection to the petitioner's constitutional rights. Furthermore, when F.B.I. Agent Roetzel testified with regard to the same admission, despite the fact that Petitioner's counsel likewise demanded a hearing outside the jury's presence this application was denied by the Court (R. 1066, 1068).

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The proper procedure and the only procedure to have followed was as outlined in *Jackson* v. *Denno, supra,* which entitled petitioner to a full and complete hearing outside the presence of the jury as to all the statements and by all the witnesses the Government intended to call in order to sustain their burden on the issue of voluntariness. Furthermore, under such a hearing the appellant could have testified and presented witnesses outside the presence of the jury in order for the Court to properly and providently make a determination. The trial court failed in this and its procedure caused a fundamental failure of due process which adds to the necessity now to afford appellant a hearing on the entire issue of voluntariness which was the only significant factor in securing his conviction.

F.B.I. Agent Roetzel further testified that he was not present at all times with Konigsberg in custody. Roetzel took turns with Straub (R. 346). It was therefore necessary to examine Roetzel outside the presence of jury to determine inconsistencies and otherwise to learn if Roetzel was merely adopting Straub's testimony as to the alleged admission.

(3) That petitioner may collaterally raise the issue of standing to attack evidence unconstitutionally seized and admitted against him in the Court of trial in violation of the United States Constitution, Amendment IV, in a § 2255 application.

The sentencing Court in its Opinion-Order was cognizant of *Thornton* v. *United States,* 368 F.2d 822 (D.C. Cir. 1966) which held that only under "special circumstances" would a collateral § 2255 attack upon a conviction violative of the United States Constitution, Amendment IV be permitted. The sentencing Court in appellant's § 2255 application found no "exceptional circumstances present to warrant an exception to the general rule prohibiting collateral review" (O. 12).

The United States Supreme Court in *Kaufman* v. *United States,* 394 U.S. 217 (1969) ruled that a federal prisoner is entitled to seek § 2255 relief on claim that evidence used against him was obtained as a result of an unreasonable search and seizure. The sentencing Court did not have the benefit of *Kaufman, supra,* since the Opinion-Order was previous to this decision. It is therefore clear that petitioner's Fourth Amendment claim is here cognizable under § 2255 attack. The *Kaufman* decision was clearly foreseeable in *Sibron* v. *New York,* 392 U.S. 40 (1968) at page 61:

> "The Fourth Amendment is binding on all branches of government. The Government cannot authorize police conduct which trenches upon Fourth Amendment rights, regardless of the labels which it attaches to such conduct."

As an after-though the sentencing Court in its denial of Konigsberg's demand for a hearing opined that (O. 12):

> "Neither has petitioner demonstrated that a redetermination of this issue would serve the ends of justice. Therefore, collateral review is not available either on the law or by way of an evidentiary hearing inasmuch as there has been no showing that this ground for relief is cognizable by collateral attack or that the previous failure in the Court of Appeals does not bar collateral relief."

The sentencing Court in its determination relies on the disposition of the suppression issue raised on direct appeal this Court refused to apply the ruling in *Jones* v. *United States,* 362 U.S. 257, 4 L. Ed. 2d 697 (1960), explaining that where possession is the ingredient of the offense, standing to raise the issue of suppression and a Fourth Amendment violation are automatically conferred. The sentencing Court ruled petitioner here was not charged with a possessory crime exclusively, as was in fact the case, and found

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that since it was only one element of the charged offense of interstate theft the petitioner was compelled to make a showing of standing to raise a Fourth Amendment contention even if this was cognizable by § 2255 application.

Such an interpretation of the *Jones* case, *supra,* in the light of *Simmons* v. *United States,* 390 U.S. 377 (1968) results narrow and violative of due process. The prosecution is constrained to prove each element of the offense charged beyond a reasonable doubt. The fact that an offense involves several elements does not minimize his burden and it is violative of due process to hold that where the possession of the subject matter per se is against the law no showing need be made while if the subject matter is not per se against the law the defendant must lay a foundation for his attack makes the Fourth Amendment guarantee inoperative in a large number of cases. The *Kaufman* case, *supra,* in no uncertain terms elevates the protection of the Fourth Amendment right to equal that of any other constitutional guarantee. It was error to deny petitioner a hearing and a determination on the merits of his Fourth Amendment contention either on the grounds that it was not cognizable within § 2255 attack or that he failed to make a showing that he had standing to make a Fourth Amendment claim. Furthermore, in the latter connection the evidence at the trial clearly established that the right of the petitioner to be in the garage was never contested and to have ruled that he had no possessory interest in the premises in which the stolen subject matter was found, gave him no right to attack the possession of this very subject matter imputed to him by his lawful presence in the garage was to make jest with due process.

In *Simmons* v. *United States, supra,* Mr. Justice Harlan, speaking for the Court, at page 390, indicated:

> "In part to avoid having to resolve the issue presented by this case, we relaxed those standing requirements in two alternative ways in *Jones* v.

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> *United States, supra.* First, we held that when, as in *Jones,* possession of the seized evidence is itself an essential element of the offense with which the defendant is charged, the Government is precluded from denying that the defendant has the requisite possessory interest to challenge the admission of the evidence. Second, we held alternatively that the defendant need have no possessory interest in the searched premises in order to have standing; it is sufficient that he be legitimately on those premises when the search occurs."

The Court in this recent case spoke of possession as "an element" not the only element or the exclusive element but one of the elements. The petitioner here was convicted of 18 U.S.C. § 659, a crime of *possession.* In *Simmons, supra,* Garrett complained about a suitcase here the articles are clothing.

The Court in *Simmons, supra,* at page 390, did not foreclose the "police-deterrent" rationale for the exclusionary rule enunciated in *Linkeletter* v. *Walker,* 381 U.S. 618 (1965) but simply did not reach this issue. In any event, the appellant was convicted of possession of stolen property which places him within *Jones, supra,* as defined by *Simmons, supra.*

Had the sentencing Court foreseen *Kaufman, supra,* and the applicability of raising a Fourth Amendment issue via a § 2255 petition the petitioner here through a fact-finding hearing would have established standing and asked the Court to apply the standards mandated by the Supreme Court recently in *Spinelli* v. *United States,* 393 U.S. 410 (1969) extending *Aguilar* v. *Texas,* 378 U.S. 108 (1964), and applied favorably in *White* v. *Swenson,* 301 F. Supp. 447 (U.S.D.C. of Mo., 1969).

In the trial below the Government failed to utilize a search warrant it had obtained because of its obvious il-

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legality. It relied instead on probable cause to arrest on January 11th, 1962 and to make a search incident thereto. The only information the Government actually possessed was some inconclusive information from a tipster and the fact that the F.B.I. surveillance the day previous to the arrest and search revealed unidentified suits in a car which emerged from the garage where the arrest and search subsequently occurred. The sentencing Court obviously foreclosed appellant's request on the basis that he could not raise the § 2255 contention because of *Thornton, supra,* being unaware of *Kaufman, supra,* and therefore never reached the principles expounded in *Spinelli, supra,* making the search revealed at trial constitutionally repugnant.

The Court of Appeals found that even if Konigsberg's posture on standing is accepted, a § 2255 attack would be fruitless since the Trial Court in denying the motion to suppress not only found standing lacking but in any event ruled that the search and seizure proper and consistent with probable cause and other constitutional mandates. We cannot have it both ways. If petitioner's posture at the pre-trial hearing was to establish standing in order to bring on a Fourth Amendment attack on the unconstitutionality of a search and seizure he cannot be denied on one ground and justified on another. This would be less than due process.

What is important is that the § 2255 Court denied Konigsberg on this issue on the grounds that his petition did not fall within the *Thornton* special circumstances rule. The fact is that Konigsberg is now within the *Kaufman* rationale. He is entitled to a judicial determination on the basis of his § 2255 contention.

The argument is urged that *Simmons* v. *United States,* 390 U.S. 377 (1968) does not change the rule in *Jones* v. *United States,* 362 U.S. 257 (1960). The Government maintained correctly that "Jones is still limited to the situa-

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tion where possession is an essential element of the crime charged." *Konigsberg was convicted here of violation of 18 U.S.C. § 659, a crime of possession.* There can be no question that possession of stolen property was essential and paramount in this conviction. Simmons did not overrule *Jones* but clarified it to the extent of pointing out that possession need not only be the sole and exclusive element involved but only "an essential element", 390 U.S. 377 (1968) at page 390. True enough the Court considered *Hobson's Choice* and went on to indicate that a defendant could testify on the issue of a Fourth amendment violation without fear of this testimony later used at trial against him. However, the *Simmons* decisions expounded and affirmed the proposition that a defendant who wishes to assert a fourth amendment objection is not required to show that he is the owner or possessor of the seized property or that he had a possessory interest in the searched premises if the possession of the seized property is an essential element of this offense.

In *Mancusi, Warden* v. *DeForte,* 392 U.S. 364 (1967) the Court quoted *Jones, supra,* 362 U.S. at 267, for the proposition that "anyone legitimately on premises where a search occurs may challenge its legality . . . when its fruits are proposed to be used against him." *Mancusi* went on to say that *Jones* explicitly did away with the requirement that to establish standing one must show legal possession or ownership of the searched premises. Moreover, in *Katz* v. *United States,* 389 U.S. 347, the Supreme Court made clear that the Fourth Amendment depended not upon a property right but was in fact a personal right involving a reasonable expectation of freedom from government intrusion. The import of the *Mancusi* decision as it effects *Jones* can best be understood through the dissent in *Mancusi* by Mr. Justice Black, at page 375:

> "The Court today puts great stress on the statement in Jones that 'anyone legitimately on premises where

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> a search occurs may challenge its legality . . . when its fruits are proposed to be used against him.' 362 U.S. at 267."

The minority opinion called it a "sweeping dictum". As it applies to Konigsberg, the evidence is void of any showing that he was a trespasser on the situs of the search and more important the evidence indicates that he was there under lawful authority.

Even without consideration of the subsequent decisions that explained and expounded upon *Jones* it is clear that the affirmance of the conviction against Konigsberg on this issue has been singled out for criticism. *Niro* v. *United States,* 388 F.2d 535, 537 (1st Cir. 1968). That case involved a case quite similar to the instant one and the court held that the defendant had standing where possession was an element of the offense charged. The Ninth Circuit has also recently agreed with the *Niro* interpretation of *Jones* in *Wattenburg* v. *United States,* 388 F.2d 853, 859 (9th Cir. 1968).

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CONCLUSION

May it please the Court, it is respectfully urged that the petition for a writ of certiorari be granted and may the Court exercise its supervisory powers over the administration of justice herein.

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Respectfully submitted,

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